United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1123

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P/S

To be argued by:
Andrew M. Lawler, Jr.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-vs.-

FRANCISCO GUINART,

Appellant.

On Appeal from the United States District
Court for the Southern District of New York

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BRIEF FOR APPELLANT FRANCISCO GUINART

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QUESTION PRESENTED FOR REVIEW

The sole issue presented for review on this appeal is whether the District Court should have divested itself of jurisdiction over the defendant by reason of the illegal manner in which the defendant was brought from Chile into the jurisdiction of the United States of America.

STATEMENT OF THE CASE

Defendant-Appellant Francisco Guinart ("Defendant") appeals from a Judgment of Conviction entered in the Southern District of New York on February 28, 1975 by United States District Court Judge Lee P. Gagliardi sentencing Defendant to serve concurrent sentences of five (5) years after the entry of pleas of guilty to two separate Indictments charging the Defendant with violations of the Federal Narcotics Laws. *

Pursuant to Stipulation between the United States Attorney's Office and the attorney for the Defendant, filed at the time of the entry of the pleas of guilty, the Defendant specifically reserved his right to appeal an Order of Judge Gagliardi which had denied, without a hearing, Defendant's pre-trial application for a Writ of Habeas Corpus. ** In that Writ the Defendant had moved for an Order of the Court divesting itself of jurisdiction over the person of the Defendant on the

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* One of the two Indictments had originally been filed in the Eastern District of New York and was thereafter transferred to the Southern District of New York pursuant to Rule 20, Federal Rules of Criminal Procedure.

** In denying Defendant's motion, Judge Gagliardi did not file a written opinion.

grounds that he was illegally abducted from his native country of Chile and transported to the United States, with the complicity and under the active direction of agents of the United States Government.

I. Defendant's Motion

The Defendant, a citizen of Chile, filed a Petition for a Writ of Habeas Corpus in which he alleged that he had been deprived of his rights under due process of law in that he had been brought to this country as a direct result of the illegal activities of agents of the United States Government. This application was supported by an Affidavit of the Defendant and by various documents which related to the manner by which he was initially detained in Chile and thereafter brought to the United States.

In his Affidavit (37-A - 40-A) * the Defendant stated that on or about October 28, 1973, he was arrested in Chile by a number of Chilean agents and another agent whom he believed to be an American. The Defendant was thereafter forceably taken to a police station in Concon, Chile, where he was handcuffed and beaten. The Affidavit further alleged that he was denied medical treatment while at Concon.

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* References with the letter "A" refer to Appellant's Appendix.

From Concon the Defendant was taken to Santiago where he was placed in a detention cell at a police station. Again, Defendant alleges he was beaten and in addition he was tortured by the use of electric shocks which were applied to his body. All of this conduct was carried out by agents of the Chilean Government. While in jail in Santiago the Defendant retained an attorney who obtained a Writ of Habeas Corpus from the Chilean Supreme Court and he was brought to that Court for a hearing. The Defendant was then removed from the detention cell at the police station and transferred to a Santiago prison, where he was placed in solitary confinement for five days with little food provided to him during the entire period. Soon thereafter the Defendant, along with a number of other prisoners, was moved once again. A hood was placed over his head so that he could not tell the location of his new prison or camp, nor was any explanation given as to why he was being moved. The Defendant was confined in that camp for approximately twenty-four hours and thereafter at approximately midnight of the second day he was awakened and taken with other prisoners to Pudahuel Airport at Santiago, Chile. All the prisoners were informed at that time that anyone attempting to escape would be shot.

The Defendant and the eight other prisoners were ordered to board the plane. (There were seven Chileans, one Argentinian and one female Brazilian.) At the airport Defendant observed two American officers who appeared to be in charge. These same two American officers, along with nine Chilean agents thereafter accompanied the Defendant and the others on the flight to New York, and the Americans gave the orders on the plane. The Defendant stated in his Affidavit that he had reason to believe that the Lan Chilean Airlines plane which brought him to the United States had been chartered and paid for by the American Government. The flight landed in New York where it was met by a number of Federal Narcotic Agents, one of whom placed the Defendant under arrest.

The documents which the Defendant was able to obtain from Chile reflected that his arrest in Chile was as a direct result of a request by the American Government for provisional detention of the defendant and others for future extradition (41-A - 43-A). Thereafter, however, the documents reflect that the United States Government withdrew this request for provisional detention and the Defendant was ordered to be set free (49-A). At or about the same time an Order of Expulsion was signed by the Chilean Government and it was allegedly pursuant to this Expulsion Order that

Defendant was placed on a plane and delivered to the United States.

II. Government's Affidavit in Opposition to Motion

The Government submitted an Affidavit of Charles W. Cecil, Jr., a Special Agent of the Drug Enforcement Administration ("DEA") who for the past two years had been assigned to the Santiago, Chile, District Office of that Agency. Cecil stated (52-A - 54-A) upon information and belief that Defendant had been expelled from Chile and transferred to the United States under the following circumstances:

On or about September 22, 1973, the overseas operation section of the DEA cabled their Santiago District Office that the United States Attorneys in the Eastern District and Southern District of New York intended to prosecute the Defendant and others for violation of the narcotics laws of the United States. Thereafter, on October 5, 1973, a provisional arrest request was submitted to the Chilean Government for the arrest of a number of individuals, including Francisco Guinart. The Defendant was arrested pursuant to this provisional arrest warrant on October 31, 1973 by Chilean authorities in Chile. On December 3, 1973, an Order of Expulsion for Defendant and

others was signed by the Chilean authorities.

The Defendant and eight others were brought to Pudahuel International Airport in Santiago, Chile, on December 4, 1973 where they were placed aboard a non-stop flight from Santiago, Chile to Kennedy International Airport in New York City. On this flight they were accompanied by an agent of the DEA and six Chilean policemen. Upon arrival in the United Stated, the Defendant was taken into custody by agents of the DEA.

After consideration of the Defendant's moving papers and the Reply Affidavit submitted by the Government, Judge Gagliardi denied Defendant's motion without a hearing.

ARGUMENT

POINT I

THE DISTRICT COURT SHOULD HAVE DIVESTED ITSELF OF JURISDICTION OVER THE DEFENDANT BY REASON OF THE ILLEGAL MANNER IN WHICH THE DEFENDANT WAS BROUGHT INTO THE JURISDICTION OF THE UNITED STATES

Defendant respectfully submits that he was denied due process of law when at the initiation of agents of the United States Government and with their knowledge he was improperly detained, tortured and forceably brought into this Country against his will.

In United States v. Toscanino, 500 F.2d 267 (2nd Cir., 1974) Re-hearing denied, 504 F.2d 1380 (1974), this Court re-examined the doctrine of Ker v. Illinois, 119 U.S. 435 (1888) and Frisbie v. Collins, 342 U.S. 519 (1952) and concluded that due process required the Federal Courts to divest themselves of jurisdiction over the person of a defendant where such jurisdiction had been acquired as a result of the Government's "deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."

The Court in Toscanino, supra, went on to state that due process is no longer:

> ".....limited to the guarantee of 'fair' procedure at trial. In an effort to deter police misconduct, the term has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial. See United States v. Russell, 411 U.S. 423 [1973]; Mapp v. Ohio, 367 U.S. 643 [1961]; Miranda v. Arizona, 384 U.S. 436 [1966]; Wong Sun v. United States, 371 U.S. 471 [1963]; Silverman v. United States, 365 U.S. 505 [1961]" (Id. at 272)

The Defendant recognizes that the Toscanino holding has been subsequently refined in United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2nd Cir., 1975) and United States v. Lira, ____F.2d____ (Docket No. 74-2567, 2nd Cir., April 14, 1975). * While in each of these cases this Court affirmed the lower court's denial of the defendant's application to have the District Court divest itself of jurisdiction over the person of the defendant by reason of the Government's illegal conduct, this Court also reaffirmed the principle set forth in Toscanino, supra. Thus, in United States v. Lira, supra, the Court stated:

> ".....where the government itself secures the defendant's presence in the jurisdiction through use of cruel and inhuman conduct amounting to a patent violation of due process principles, it may not take advantage of its own denial of the defendant's constitutional rights. We there stated that a District Court must 'divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unrea-

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* See also: United States v. Herrera, 504 F.2d 859 (5th Cir., 1974)

> "sonable and unnecessary invasion of the accused's constitutional rights.' [500 F.2d at 275]. More recently in United States ex. rel Lujan v. Gengler, ___F.2d___ (2nd Cir., January 8, 1975), Slip Opinion 1197, we reaffirmed the principle that the Ker-Frisbie Doctrine does not bar judicial scrutiny of 'conduct of the most outrageous and reprehensible kind by United States Government agents,' which results in denial of due process, Slip Opinion 1202, although we there found that the Government's conduct did not reach the level proscribed by Toscanino. (Id. at 2874 - 2875)

The Defendant submits that this case is clearly distinguishable from Lujan, supra. In the Lujan Opinion, wherein this Court distinguished that case from Toscanino it was emphasized that Lujan specifically disclaimed any allegation of torture (510 F.2d at 66). Here Defendant Guinart in his Affidavit to the District Court specifically alleged numerous instances of inhuman treatment, including torture, and the denial of food and medical attention during the period he was in custody in Chile. It must be acknowledged that the allegations set forth in Lira, supra, parallel in many respects the claims raised by Guinart. Essential to the Lira holding, however, was the finding that there was no direct involvement by the United States Government in the alleged misconduct. In the present case the documents submitted in support of the motion reflect that the arrest and subsequent detention of the Defendant were the direct result of a specific request from

the United States Government. In addition, Guinart alleged that at the time of his initial arrest there was an individual present whom he believed to be a United States agent. While there are no allegations of American involvement in the torture, it is clear that the arrest of Guinart was initiated by this Government and that United States representatives were fully aware of his detention. The Defendant further alleged that United States Government agents were present at the time that he was forceably put on a plane, and that those agents appeared to be in charge of the entire operation both at the airport and on his subsequent trip to this Country. The Defendant also alleged that he had reason to believe that the plane was chartered and paid for by the United States Government. The Defendant would submit that while Judge Oakes in his concurring Opinion in Lira, found "that this case [Lira] falls - just barely - on the Lujan rather than the Toscanino side of the line," the different facts presented by Guinart places the instant case on the Toscanino side of that narrow line.

To the extent that the record below fails to clearly establish the full extent of American involvement in the events in Chile, that failure is a result of the denial of the Defendant's application for a hearing. It is respectfully submitted that the holding of Toscanino, supra, is such that the District Court below was required

to hold an evidentiary hearing in light of the allegations raised in Guinart's Affidavit. In the absence of the opportunity to call witnesses and cross-examine Government agents, it was and is impossible to fully develop all of the facts surrounding the Defendant's forceable abduction and transfer to this Country.

Defendant further submits that this Court should, as a matter of policy and in the exercise of its supervisory powers over the administration of the Federal criminal justice system, bar jurisdiction in cases of this nature. In his concurring opinion in Lira, supra, Judge Oakes states:

> "Finally it should be said that, regardless of the abstract doctrine Ker and Frisbie are said to stand for, we can reach a time when in the interest 'of establishing and maintaining civilized standards of procedure and evidence,' we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power under McNabb v. United States, 318 U.S. 332, 340 [1942] and Mallory v. United States, 354 U.S. 449 [1957]. As we pointed out in Toscanino, supra, that 'supervisory power is not limited to the admission or exclusion of evidence, but may be exercised in any manner necessary to remedy abuses of a District Court's process.' 500 F.2d at 276. To my mind the Government in the laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interests of the greater good of preserving respect for law." (Id. At Slip Opinion 2880)

This Court has already been called upon to decide a number of cases involving allegations of kidnapping, torture and other illegal conduct and there is evidence of similar cases which have yet to reach this Court. (Lira, supra, at 3878) It is unfortuante but true that the conduct in question does not relate to an isolated incident but appears to be part of a larger policy embarked upon by the Government to obtain physical jurisdiction over individuals whom the Government might not otherwise have legally been able to obtain such jurisdiction. This Court noted in Lira, supra, that the DEA is required to cooperate with many foreign governments in legitimately seeking the transfer of violators of United States laws. While the Defendant would accept that statement, it is difficult to apply that rationale to the present case. Despite the fact that the Defendant as a Chilean citizen could never have been extradited to this Country - since "under the Extradition Treaty between the United States and Chile, a Chilean national, ...cannot be extradited to the United States" (Lira, supra, at 2873 N.2) - the Defendant was provisionally detained at the request of the United States Government for future "extradition" to this Country. (41-A - 43-A) It is impossible to imagine that both this Government and the Government of Chile were not fully aware that such a request was a sham in that the Defendant could never have been extradited to this Country.

It was, of course, during this period of detention that the Defendant was subjected to the torture and other inhumane treatment described in his Affidavit. Thereafter, the documents reflect that the United States Government withdrew its request for provisional detention and the Defendant was ordered freed (49-A). Simultaneously, however, he was ordered expelled by another Decree of the Chilean Government. (57-A - 59-A) As was indicated in Lira, supra, such a Decree gave the Defendant a right to choose the country to which he would be deported. That right was arbitrarily and systematically denied to all of the expelled defendants by the deliberate and improper actions of the Chilean and American Governments.

It is respectfully submitted that this Court should not allow the United States Government with or without the complicity of the governments of other nations to abuse extradition treaties and to violate the internal laws of those nations in order to obtain jurisdiction over individuals whom they would not otherwise be able to bring to this Country. Defendant requests that this Court exercise its supervisory power to bar jurisdiction in this case and any other case where the Court finds similar abuses of the legal process by the Government of the United States.

CONCLUSION

The Judgment of Conviction should be set aside and an order of this Court should be entered directing the District Court to divest itself of jurisdiction over the person of the Defendant or in the alternative the matter should be remanded to the District Court for a full evidentiary hearing on the merits of Defendant's application for a Writ of Habeas Corpus.

Respectfully submitted,

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Of Counsel:

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

BENJAMIN BRAFMAN, being duly sworn, deposes and says:

That deponent is not a party to this action, is over 18 years of age and resides at Queens County.

That on the 28th day of July, 1975, at One St. Andrew's Plaza, New York, New York, 10007, deponent served one (1) copy of Appellant's Appendix and two (2) copies of Appellant's Brief upon the United States Attorney's Office for the Southern District of New York, the attorneys for the Appellee in this matter by delivering a true copy thereof to _____ a person duly authorized to accept said service, personally. Deponent knew the person so served was authorized to accept such service on behalf of the Appellee herein.

Benjamin Brafman
BENJAMIN BRAFMAN

SWORN TO BEFORE ME THIS
28 day of July, 1975

Jeanne M. Henigin

JEANNE M. HENIGIN
Notary Public, State of New York
No. 41-6852575
Qualified in Queens County
Commission Expires March 30, 19

COPY RECEIVED
JUL 28 1975
PAUL J. CURRAN
U.S. ATTORNEY
SO. DIST. OF N.Y.